IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERARD BILLEBAULT	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
PETER M. DIBATTISTE, M.D.	:	
LAMBERTO BENTIVOGLIO, M.D.	:	
LANKENAU HOSPITAL ASSOC.,	:	
MAIN LINE CARDIOVASCULAR	:	NO. 96-6501
ASSOC., LTD., DVI, a/k/a	:	
DEVICES FOR VASCULAR	:	
INTERVENTION, INC. and	:	
GUIDANT CORPORATION	:	

MEMORANDUM AND ORDER

BECHTLE, J. MAY 19, 1998

Presently before the court is defendant Lamberto Bentivoglio's ("Dr. Bentivoglio") motion for summary judgment and plaintiff Gerard Billebault's ("Mr. Billebault") response thereto. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

Plaintiff brings this medical malpractice and products liability action requesting damages for personal injuries. On February 16, 1995, Mr. Billebault consulted Dr. Bentivoglio in the office of Main Line Cardiovascular Associates ("MLCA") complaining of chest pains and breathing difficulty. After examining Mr. Billebault and considering his medical history, Dr.

Bentivoglio recommended that Mr. Billebault undergo cardiac catheterization and angioplasty procedures. Dr. Bentivoglio explained the risks to the cardiac catheterization and angioplasty procedures.[1] He further explained that his colleague, Dr. DiBattiste would administer the procedures.[2] Mr. Billebault signed a consent form authorizing Dr. DiBattiste to perform "cardiac catheterization and percutaneous transluminal coronary angioplasty." (Pl.'s Mem. Opp. Summ. J., Ex. I.) In his deposition, Dr. DiBattiste stated that he explained the procedures to Mr. Billebault, along with the risks and obtained his informed consent to perform the procedures. (Def.'s Mem. Supp. Summ. J., Ex. C at 61-62.) On February 22, 1995, Dr. DiBattiste admitted Mr. Billebault to Lankenau Hospital and performed the catheterization procedure. While administering the catheterization procedure, Dr. DiBattiste discovered that a lesion blocked eighty to ninety percent of Mr. Billebault's left anterior descending artery. Dr. DiBattiste decided to perform a surgical procedure, known as a directional coronary atherectomy, ("DCA") to eliminate the obstruction in the artery.[3] While Dr.

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1. Mr. Billebault alleges that Dr. Bentivoglio described the angioplasty as a "balloon" procedure. (Pl.'s Mem. Opp. Summ. J. at 2, 7.)

2. At that time, Dr. DiBattiste was President of MCLA and Dr. Bentivoglio was an associate at MCLA.

3. A DCA procedure is performed to eliminate or lessen blockages of coronary arteries by employing an atherectomy device to mechanically shave and remove plaque from the diseased vessel. The procedure involves the use of a cutting instrument as opposed to an angioplasty which involves a non-cutting balloon procedure.

DiBattiste was performing the DCA, the tip of a coronary guide wire[4] used to guide the catheter through the artery fractured and separated from the rest of the wire. Dr. DiBattiste attempted to extract the separated portion of the wire. However, he was unsuccessful in retrieving the wire fragment. Dr. DiBattiste telephoned Dr. Bentivoglio and told him about the complication. Dr. Bentivoglio then arrived at the hospital and volunteered to speak to other physicians to see if they had any advice on how to retrieve the fractured wire. (Def.'s Mot. Supp. Summ. J., Ex. D at 25-42.) Dr. Bentivoglio did not participate in the retrieval process. Additionally, Dr. DiBattiste stated in his deposition that he did not receive any specific recommendations from Dr. Bentivoglio as to how to retrieve the fractured wire and that he did not follow any specific recommendations from Dr. Bentivoglio. (Def.'s Mot. Supp. Summ. J., Ex. C at 180.) Immediately following Dr. DiBattiste's retrieval attempts, Mr. Billebault underwent emergency coronary bypass surgery.

On September 25, 1996, Mr. Billebault commenced this medical malpractice action against Dr. Bentivoglio.[5] Mr. Billebault alleges that Dr. Bentivoglio failed to adequately inform him of the risks of the catheterization and DCA procedures and that Dr. Bentivoglio was negligent in failing to do so. Mr. Billebault

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4. A guide wire is not used during catheterization.

5. The court has subject matter jurisdiction over this action because diversity of citizenship exists between the parties and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332.

relies on the consent form he signed which lists "cardiac catheterization and percutaneous transluminal coronary angioplasty" as the procedure to be performed. The form does not list "DCA" as a procedure to be performed. Mr. Billebault does not allege that Dr. Bentivoglio performed any of the procedures, including the DCA. On October 14, 1997, Dr. Bentivoglio filed the instant motion for summary judgment. On October 30, 1997, Mr. Billebault filed his response to the motion.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. When considering a motion for summary judgment, all of the facts must be viewed in the light most favorable to the non-moving party. Id. at 255.

III. DISCUSSION

In his Complaint, Mr. Billebault alleges that Dr. Bentivoglio failed to inform him of the potential risks of the catheterization, angioplasty and/or the atherectomy procedures. Compl. at ¶ 25. Alternatively, Mr. Billebault argues that Dr. Bentivoglio may be vicariously liable or liable under agency principles. Additionally, Mr. Billebault alleges that Dr. Bentivoglio's negligence directly and proximately caused his injuries. Dr. Bentivoglio asks the court to enter summary judgment in his favor on all claims. For the reasons set forth below, the court will grant Dr. Bentivoglio's motion.

A. Informed Consent

Under Pennsylvania law,[6] the doctrine of informed consent generally applies only to the surgeon who performs an operation without first obtaining the informed consent of the patient. Shaw v. Kirschbaum, 653 A.2d 12 (Pa. Super. Ct. 1994). The doctrine is grounded in battery theory and "where a technical battery does not occur, Pennsylvania courts have steadfastly refused to invoke the doctrine of informed consent." Jones v. Philadelphia College of Osteopathic Med., 813 F. Supp. 1125, 1129 (E.D. Pa. 1993). Dr. Bentivoglio argues that because, he did not perform the catheterization, angioplasty or DCA procedures, he did not commit a technical battery upon Mr. Billebault, and

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6. A federal court sitting in diversity is required to follow the substantive law of the applicable state. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The court agrees with the parties that Pennsylvania law applies to this civil action.

therefore cannot be held liable on an informed consent theory. Mr. Billebault does not allege that Dr. Bentivoglio performed the procedures. However, Mr. Billebault argues that Dr. Bentivoglio is liable under an exception to the general rule that only the operating surgeon must obtain the patient's informed consent.

1. Voluntary assumption

Mr. Billebault argues that because Dr. Bentivoglio explained the risks of the catheterization and angioplasty procedures that he assumed the duty to inform him of all the risks involved and can be held liable even though he did not actually perform the procedures. Mr. Billebault primarily relies on Jones v. Philadelphia College of Osteopathic Medicine, 813 F. Supp. 1125, (E.D. Pa. 1993), to assert liability against Dr. Bentivoglio under this theory. In Jones, the court denied a hospital's motion to dismiss an informed consent claim because the hospital prepared and furnished the informed consent form which carried the name and logo of the hospital. Id. at 1131. Mr. Billebault argues that because Dr. Bentivoglio explained the risks of the catheterization and angioplasty procedure that he assumed the duty to inform him of all the risks involved. Dr. Bentivoglio does not dispute that he explained the risks associated with the cardiac catheterization and angioplasty procedures to Mr. Billebault and obtained his signature on the consent form authorizing Dr. DiBattiste to perform the procedures. (Def.'s Mem. Supp. Summ. J. at 2.) However, he argues that this court should not extend the ruling in Jones to

this case. The court agrees. The Pennsylvania courts have not extended Jones to cover the situation before this court where a physician fills out the consent form for another physician who actually performs the surgical procedure. Rather, Pennsylvania courts have required the physician performing the surgery to obtain the patient's informed consent. See Shaw v. Kirschbaum, 653 A.2d 12 (Pa. Super. Ct. 1994)(refusing to impose on referring physician the obligation to provide all information necessary for patient to provide informed consent to actual surgeon), appeal denied, 664 A.2d 542 (Pa. 1995); Foflygen v. R. Zemel, M.D., 615 A.2d 1345 (Pa. Super. Ct. 1992)(holding that doctor who performed pre-surgery physical examination did not have duty to obtain informed consent to operation performed by another physician), appeal denied, 657 A.2d 1314 (Pa. 1993). Accordingly, this court will not extend Jones to Mr. Billebault's case. The court finds that Dr. Bentivoglio did not assume the duty to inform Mr. Billebault of the risks involved in the procedures performed by Dr. DiBattiste.

2. Duty of non-surgeon to obtain informed consent under government regulations

Pennsylvania courts have recognized an exception to the general rule that only the surgeon actually performing a surgical procedure is required to obtain a patient's informed consent. In Friter v. Iolab Corp., 607 A.2d 1111 (Pa. Super. Ct. 1992), the court held that a hospital participating in a clinical study was required by Food and Drug Administration regulations to obtain a

patient's informed consent prior to the patient participating in the study. The court held that the federal regulations which applied to the hospital as a participant in a clinical investigation imposed an affirmative duty upon the hospital to obtain the patient's informed consent. Id. at 1114. In the instant case, there is no evidence of any regulations, federal or state, that required Dr. Bentivoglio to obtain Mr. Billebault's informed consent before another physician performed the catheterization or DCA procedures. Therefore, the narrow exception set forth in Friter does not apply to this case.

3. Vicarious Liability

Mr. Billebault relies on Grabowski v. Quigley, 648 A.2d 610 (Pa. Super. Ct. 1995), appeal granted, 698 A.2d 594 (1997), to assert liability against Dr. Bentivoglio on a vicarious liability theory. In Grabowski, the Superior Court held that under the circumstances of that case a physician could be vicariously liable for battery even though that physician did not perform the patient's operation. Id. at 617. In that case a patient was scheduled to undergo surgery and was already under anesthesia, when it was discovered that the doctor, Dr. Quigley, whom the patient gave consent to perform the procedure, was not present at the hospital. Id. at 612. Dr. Maroon, a doctor at the hospital, became aware of Dr. Quigley's absence and directed another doctor to perform the operation until Dr. Quigley could arrive at the hospital. Id. at 613. The other doctor began the surgical procedure and Dr. Quigley arrived in time to finish the

operation. Id. The patient alleged that Dr. Maroon was vicariously liable for battery because Dr. Maroon directed another doctor to begin the surgery without the patient's consent. Id. at 617. The trial court entered summary judgment in Dr. Maroon's favor on this count. Id. However, the Superior Court held that the trial court erred by granting Dr. Maroon's motion for summary judgment. Id. Mr. Billebault argues that because Dr. Bentivoglio, like Dr. Maroon, participated in making the decision as to who should actually perform the procedures, that Dr. Bentivoglio should be held vicariously liable under an informed consent theory. The court disagrees. The case at bar is factually distinguishable from Grabowski. The primary difference is that, unlike the plaintiff in Grabowski, Mr. Billebault was aware that another physician would actually perform the catheterization and angioplasty procedures. Further, Mr. Billebault agreed to allow Dr. DiBattiste to perform the catheterization and angioplasty procedures. These circumstances are far different from those in Grabowski where the plaintiff was under anesthesia and had no knowledge that a physician other than the one to which he gave consent would be performing his operation. The court will not extend the Superior Court's holding in Grabowski to find that Dr. Bentivoglio may be vicariously liable in this situation.

B. Agency

Mr. Billebault argues that an agency relationship existed between Dr. Bentivoglio and Dr. DiBattiste because of their

financial arrangement and because they shared the same office suite. Under Pennsylvania law, "a principal may be held vicariously responsible for the acts of his agent where the principal controls the manner and performance and the result of the agent's work." Strain v. Ferroni, 592 A.2d 698, 704 (Pa. Super. Ct. 1991)(citations omitted). In determining whether an agency relationship exists, "it is the right to control which is determinative." Yortson v. Pennell, 153 A.2d 255, 260 (Pa. 1959)(emphasis added). Mr. Billebault has not presented any evidence that Dr. Bentivoglio had the right to control the manner and performance of any work performed by Dr. DiBattiste. To the contrary, the record demonstrates that Dr. DiBattiste was free to, and in fact did, exercise his own independent medical judgment in rendering medical care to Mr. Billebault. Further, Mr. Billebault has not presented any evidence that Dr. DiBattiste was required to seek any clearance or authorization from Dr. Bentivoglio before treating Mr. Billebault. The record presented to the court supports the finding that Dr. DiBattiste maintained complete and exclusive control over the manner in which he provided medical treatment to Mr. Billebault. (Def.'s Mot. Supp. Summ. J., Ex. C at 180). Under these circumstances, Dr. Bentivoglio cannot be held liable for Mr. Billebault's injuries based on agency principles.

C. Negligence

In addition to his informed consent claim, Mr. Billebault alleges that Dr. Bentivoglio's negligence in failing to inform

him of the risks of the procedures performed by Dr. DiBattiste directly and proximately caused his injuries. Relying on Joyce v. Boulevard Physical Therapy & Rehab. Ctr., 694 A.2d 648 (Pa. Super. Ct. 1997), Mr. Billebault argues that Dr. Bentivoglio's duty to his patient did not end with the referral to Dr. DiBattiste. The court finds that Joyce does not support this argument. In Joyce, the court ruled that an orthopedic surgeon did not sever the doctor-patient relationship when he referred a patient to a physical therapist. The court explained that "[w]hen an orthopedic surgeon writes a prescription for his or her patient to see a physical therapist, that surgeon is charged with the same responsibilities as if he or she were writing a prescription for medication." Id. at 656. The court ruled that, like a physician writing a prescription to a pharmacist, an orthopedic surgeon's duty to a patient is not extinguished once the prescription sheet is handed to the physical therapist. Id. In making its ruling, the court specifically noted that it was not faced with a case involving a referral between medical doctors. Id. at 657 n.6. Unlike a physician-pharmacist or physician-physical therapist relationship, under normal circumstances a referring physician's duty to a patient is extinguished once another physician exercises independent medical judgment as to the patient's medical care in performing a surgical procedure. Strain v. Ferroni, 592 A.2d 698 (Pa. Super. Ct. 1991)(holding that physician was not liable for acts of covering physician exercising independent medical judgment);

Hannis v. Ashland State General Hosp., 554 A.2d 574, 578 (Pa. Super. Ct. 1987)(holding that physician had no duty to follow the care of patient after referring patient to a specialist), appeal denied, 574 A.2d 73 (Pa. 1989); see also Weidner v. Nassau, 28 Pa. D. & C.4th 269, 270 (1993)(stating that no court in Pennsylvania has recognized cause of action for negligent referral between physicians), aff'd, 647 A.2d 274 (Pa. Super. Ct. 1994)(table).

In the case before this court, Dr. Bentivoglio explained to Mr. Billebault that Dr. DiBattiste would be performing the catheterization and angioplasty procedures. Mr. Billebault consented to this arrangement. Dr. DiBattiste then assumed the duty of care to Mr. Billebault because Dr. DiBattiste maintained complete and exclusive control over the procedures administered to Mr. Billebault and exercised his independent medical judgment in deciding to perform a DCA. Under these circumstances, Dr. Bentivoglio cannot be held liable for Mr. Billebault's injuries on a negligence theory. See Shaw v. Kirschbaum, 653 A.2d 12, 15-16 (Pa. Super. Ct. 1994)(refusing to recognize an informed consent cause of action based on negligence), appeal denied, 664 A.2d 542 (Pa. 1995).

Additionally, Mr. Billebault cites Gregg v. Kane, No. 95-4630, 1997 WL 570909 (E.D. Pa. Sept. 5, 1997) to support his negligence claim. In Gregg, the court found that the plaintiff presented a convincing argument that a physician may be liable

under Section 324A of the Restatement of Torts,[7] even though that physician did not have a doctor-patient relationship with the plaintiff and did not actually perform the plaintiff's surgery. Section 324A provides:

> One who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance on the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965). In Gregg, the plaintiff was enrolled in a clinical trial at Wills Eye Hospital ("Wills") and was injured during laser eye surgery. Plaintiff brought suit against the laser manufacturer, the hospital, Dr. Daniel Kane and Dr. Stephen Trokel. Dr. Kane performed the laser surgery. Id. at *1. The court found that the plaintiff presented sufficient evidence from which a jury could reasonably conclude that Dr. Trokel, although he did not perform the surgery, undertook to render services to the physicians at Wills which he should have recognized as necessary for the protection of the plaintiff. Id. at *2. Dr. Trokel served as the medical consultant to defendant VISX, the laser manufacturer, for the clinical study and trained the doctors at Wills on the proper use

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7. Pennsylvania courts follow the provisions of Section 324A of the Restatement of Torts. Cantwell v. Allegheny County, 483 A.2d 1350, 1353 (Pa. 1984).

of the laser. Id. The plaintiff also offered evidence from which a jury could reasonably infer that the doctors that Dr. Trokel trained did not have extensive experience with laser surgery and that Dr. Trokel was aware of this fact. Id. at *3. Additionally, the plaintiff offered evidence that Dr. Trokel was aware that the "clinical investigation was difficult and poorly understood by the physicians" and that he was "aware that a person could be injured in the surgery if the proper procedures were not followed." Id. Mr. Billebault argues that his situation is similar to that of the patient in Gregg and that Dr. Bentivoglio undertook to render services to Dr. DiBattiste which he should have recognized as necessary for Mr. Billebault's protection. The court disagrees.

Unlike Dr. Trokel, Dr. Bentivoglio did not train or lecture Dr. DiBattiste as to how to perform the catheterization, angioplasty or DCA procedures. Further, the factual context of Gregg is distinguishable from Mr. Billebault's situation. Unlike Dr. Trokel, Dr. Bentivoglio was not serving as a medical monitor or consultant. Additionally, the fact that Dr. Trokel was involved in assisting the hospital in a clinical investigation warranted the imposition of a duty under Section 324A. Dr. Bentivoglio, unlike Dr. Trokel, was not in such a position where Dr. DiBattiste could be seen as relying on his instruction or expertise to similarly warrant the imposition of a duty under Section 324A.

The Superior Court's opinion in Shaw v. Kirschbaum, 653 A.2d

12 (Pa. Super. Ct. 1994), is also instructive regarding Mr. Billebault's negligence claim against Dr. Bentivoglio. In Shaw, the court discussed the application of Section 323 of the Restatement of Torts, a provision similar to Section 324A, to a plaintiff's allegation that a physician gratuitously assumed an undertaking and had negligently failed to properly perform that undertaking.[8] The court explained that Section 323 "does not obviate the traditional components of a prima facie case sounding in negligence, but rather substitutes a gratuitous undertaking for the element of duty." Id. at 16. The trial court found that a physician's "advocacy of surgery" amounted to an undertaking of a duty on the physician's part to advise the plaintiff of "the effects of the proposed surgery upon her pre-existing medical condition as well as the complications associated with the surgery." Id. The trial court further found that when the physician recommended the surgery be performed at a particular hospital the physician "gratuitously accepted a duty to advise [the plaintiff] in conformity with principles of informed consent." Id. at 16-17. In reversing and vacating the trial

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8. Section 323 reads as follows:

> One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance on the undertaking.

court's judgment, the Superior Court held that "[w]hile [the physician] strongly urged that Mrs. Shaw undergo surgery, there is no duty in Pennsylvania . . . to impose upon an attending or referring physician the obligation to provide all of the information necessary for the patient to provide an informed consent to the surgeon." Id. at 17. The court further noted that "[t]he trial court in an exercise of creative discernment attempted to expand [the informed consent] doctrine from the battery rationale to a negligenced-based rationale, but such refashioning of the law may only be undertaken by our Supreme Court." Id. at 17. Likewise, this court cannot refashion Pennsylvania law to recognize a cause of action for negligence against Dr. Bentivoglio under the circumstances of this case.

IV. CONCLUSION

For the foregoing reasons, the court will grant Dr. Bentivoglio's motion for summary judgment. Dr. Bentivoglio has shown that, viewing the facts in the light most favorable to Mr. Billebault, no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. An appropriate Order follows.

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v.	:	
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PETER M. DIBATTISTE, M.D.	:	
LAMBERTO BENTIVOGLIO, M.D.	:	
LANKENAU HOSPITAL ASSOC.,	:	
MAIN LINE CARDIOVASCULAR	:	NO. 96-6501
ASSOC., LTD., DVI, a/k/a	:	
DEVICES FOR VASCULAR	:	
INTERVENTION, INC. and	:	
GUIDANT CORPORATION	:	

ORDER

AND NOW, TO WIT, this day of May, 1998, upon consideration of defendant Lamberto Bentivoglio, M.D.'s Motion for Summary Judgment and plaintiff Gerard Billebault's response thereto, IT IS ORDERED that said motion is GRANTED. Judgment is entered in favor of Lamberto Bentivoglio, M.D. and against Gerard Billebault.

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LOUIS C. BECHTLE, J.